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No. 01-186

IN THE

Supreme Court of the United States

NATIONAL GEOGRAPHIC SOCIETY, NATIONAL GEOGRAPHIC ENTERPRISES, INC., and MINDSCAPE, INC.,
Petitioners,

v.

JERRY GREENBERG and IDAZ GREENBERG,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, INC., *ET AL.* IN SUPPORT OF RESPONDENTS

VICTOR S. PERLMAN *
AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS
150 North Second Street
Philadelphia, PA 19106-1912
(215) 451-0884

* Counsel of Record

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BRIEF OF *AMICI CURIAE* AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, INC., *ET AL.* IN SUPPORT OF RESPONDENTS AND IN OPPOSITION TO THE PETITION FOR CERTIORARI

INTERESTS OF *AMICI CURIAE*

Amici Curiae American Society of Media Photographers, Inc., *et al.* (collectively "ASMP") hereby respectfully submit this brief in support of the opposition to the Petition for Certiorari filed by Respondents Jerry Greenberg and Idaz Greenberg ("Respondents"). A complete listing of the eleven organizations comprising the *amici curiae* is set forth in Appendix A to this brief.[1]

The *amici curiae* organizations supporting the Respondents in opposing the grant of certiorari in this case have a substantial interest in defending and preserving the copyrights of freelance photographers, writers, graphic artists, fine artists and cartoonists (collectively "freelance authors"). As many of these *amici* explained in their brief in support of the respondents in the recently decided case of *New York Times Co., Inc. v. Tasini*, 121 S.Ct. 2381 (2001), freelance authors represented by *amici* produce a significant portion of the material that regularly appears in periodicals such as the New York Times and National Geographic. Since freelance authors rely upon their copyrights for their livelihoods, they have strongly opposed the overreaching efforts of some publishers to use a heretofore obscure provision of the Copyright Act, 17 U.S.C. § 201(c), to deprive freelance authors of the opportunity to exploit new markets that may be available for previously published copyrighted works.

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[1] Petitioners have consented to the filing of this *amici* brief. A copy of their consent letter has been filed with the Clerk.

This brief was not authored in whole or in part by counsel for any party. No person or entity, other than *amici*, their members or their counsel, made a monetary contribution to the preparation or submission of this brief.

As in *Tasini,* the publisher here, National Geographic, has created a new product incorporating previously published copyrighted contributions by freelance authors. As in *Tasini*, the publisher here seeks cover for this unilateral act under Section 201 of the Copyright Act. And, as in *Tasini,* the republication of freelance authors' contributions to prior issues of National Geographic in the "Complete National Geographic" ("CNG"), a new CD-ROM product, cannot find shelter under Section 201(c). Indeed, National Geographic seeks to do exactly what the Court in the *Tasini* decision said that publishers cannot do: rely upon Section 201(c) to authorize the reuse of freelance authors' works when to do so "would diminish the Authors' exclusive rights in . . . [those works]." *Tasini*, 121 S.Ct. at 2390.

The primary interest of ASMP and the other *amici* in this case is to preserve the affirmation of authors' rights represented by this Court's decision in *Tasini* and avoid relitigating the question of statutory construction already disposed of by the Court in that case. In *Tasini*, this Court issued a definitive interpretation of Section 201(c) and rejected the publishers' apocalyptic predictions of doom if they were not permitted to rely upon that provision to avoid paying freelance authors for the reuse of their work. Seeking to take advantage of the timing of the Eleventh Circuit's decision in this case, Petitioners here make the same arguments presented to (and rejected by) this Court in its *Tasini* decision—inclusive of the predictions of disaster if the decision below is allowed to stand.

While the Section 201(c) issue arises here in a different factual context than in *Tasini*, the resolution of that issue by the Eleventh Circuit is fully consistent with this Court's statutory analysis of that provision, as Respondents demonstrate in their brief opposing the grant of certiorari. But even if that were not the situation, there is simply no question worthy of granting certiorari presented by the

petition. Instead, the petition is merely an attempt to relitigate the questions of statutory construction already addressed in detail by this Court and decided in favor of freelance authors in *Tasini*. The *amici* joining in this opposition submit that there is no justification for revisiting issues decided a few months ago so that publishers may have the opportunity to attempt to regain the ground lost in the *Tasini* decision. The *amici curiae* organizations therefore urge the Court to deny the petition.

I. THE FRAMING OF THE "QUESTIONS PRESENTED" DOES NOT ACCURATELY DEPICT "THE COMPLETE NATIONAL GEOGRAPHIC" OR THE DECISION BELOW

Petitioners attempt to mislead the Court by stating that the first question presented by the decision below is "[w]hether a publisher's exact, image-based reproduction of a collective work in CD-ROM format" infringes the copyrights of freelance authors who contributed to that collective work. Pet. ("Questions Presented"). In truth, the CNG consists of more than just previously published issues of National Geographic Magazine. As the Eleventh Circuit made clear and as Petitioners seek to minimize, there are two other significant elements of the CNG—what the Eleventh Circuit called the Sequence and the Program—not reflected in Petitioners' characterization of the first question presented. Those two elements, one a montage of moving National Geographic magazine covers and the other a computer program enabling functional features designed to facilitate consumer use of the product, are combined with the reproductions of previously published issues of that magazine to form the CNG. To single out one feature of the product and to suggest that the one feature completely and fairly depicts the factual foundation for the question presented is, therefore, misleading and inaccurate.

Moreover, the Eleventh Circuit pointedly and specifically remarked that it was not deciding the very issue that the Petitioners claim is presented by the lower court's decision. The Eleventh Circuit itself rejected Petitioners' characterization of the case as "one in which there has merely been a republication of a preexisting work [previously published issues of National Geographic magazine], without substantive change, in a new medium . . . ." *Greenberg v. National Geographic Society*, 244 F.3d 1267, 1273 n.12 (11th Cir. 2001). As the Eleventh Circuit expressly stated, the CNG consists of more than a mere "media transformation". *Id.* Rather, the CNG is a combination of the Replica, Sequence and Program, and could not fairly be said to consist of any one of those elements separate and apart from the others. Yet the underlying premise of the first question presented is precisely such a mischaracterization.

Petitioners's second question presented is not based upon a holding of the court below, and in fact misrepresents that court's dictum. The Eleventh Circuit did not hold that Petitioners committed a fraud on the Copyright Office. In fact, all the court said on the subject (in a footnote) was that the National Geographic Society "may not have intentionally perpetrated a fraud on the Copyright Office." *Id.* at 1273 n.13. Whether the Society did so or not was not decided by the Eleventh Circuit or, for that matter, by the district court; nor was it pertinent to the decision of either court.

Petitioners nonetheless seek to utilize verbal alchemy to convert this footnote into a holding so as to justify consideration of the second question presented. In the absence of a holding, accepting such a question for review would be inconsistent with this Court's usual practice of reviewing issues that were actually decided by the court below and that are fairly presented by its decision.

II. THERE ARE NO COMPELLING REASONS TO ACCEPT REVIEW OF YET ANOTHER CASE PRESENTING A QUESTION OF STATUTORY INTERPRETATION UNDER SECTION 201(c)

In a revealing observation, Petitioners inform the Court that "[t]his is a straightforward case of statutory interpretation." Pet. 9. Accepting that statement as true, it reflects the fact that Petitioners believe that the Eleventh Circuit wrongly decided the Section 201(c) issue in the context of this case, and that they believe this Court should correct that alleged error. But this view misapprehends the fundamental purpose of certiorari review, which as this Court has often noted, is not for the purpose of correcting the errors of the lower federal courts.

The decision below is fully consistent with this Court's recent decision in *Tasini*, as Respondents make clear in their brief. But even if that were not true, any alleged inconsistency of the Eleventh Circuit's analysis with that articulated by the Court in *Tasini* does not justify granting certiorari in this case solely to correct the Eleventh Circuit's alleged error. In the wake of this Court's recent decision in *Tasini*, there is no substantial question of fundamental importance presented in the petition or by the decision of the court below. This Court has already defined the purpose and scope of Section 201(c), and nothing about the context of this particular case warrants the extraordinary step of doing so again so as to correct the alleged error of the lower court.

The absence of any compelling justification to grant the petition is even more evident given the nature of the lower court's alleged error. Petitioners contend that the Eleventh Circuit's analysis conflicts with that of this Court in *Tasini* because, according to Petitioners, the Eleventh Circuit focused on whether the CNG should be considered a "new work" whereas in *Tasini*, again in Petitioners' view, "[t]he privilege turns on the preservation of the integrity of the

original collective work, not the technology of the medium of reproduction." Pet. 11. It is this alleged conflict, Petitioners submit, that creates the justification for accepting review of this case even though this Court's detailed analysis of Section 201(c) was delivered just a few months ago.

As Respondents demonstrate in their brief, the putative conflict between the Eleventh Circuit's approach to Section 201(c) and this Court's treatment of the statute in *Tasini* does not exist. The Eleventh Circuit focused on the question whether the CNG was a "new" work because its combination of three disparate elements—the Replica, the Sequence and the Program—put that question squarely at issue. To suggest that this Court's analysis precluded such consideration of whether a "new work" has been created, as Petitioners strenuously argue, is to ignore the teaching of the Court in *Tasini*.

As part of its analysis of the statutory issue under Section 201(c), the Court suggested in *Tasini* that one way of characterizing a "revision" would be to label it a "new version" of the work being revised—the words the Court used were a "new compendium" consisting of "the entirety of the works in the Database". 121 S.Ct. at 2391. But the Court concluded that there was simply no way that the compendium of articles in the publishers' databases could reasonably be viewed as a "revision" of the original periodical works themselves.

Consistent with this approach, the Eleventh Circuit found that the CNG was not merely a "revision" of the original editions of the National Geographic; rather, it was a new work containing many other elements, all of which were interrelated and integrated into a product useful for consumers.

Even if one were to accept Petitioners' assertion (which in fact is demonstrably untrue) that there is a "conflict" between

the analysis of the statute by the Eleventh Circuit in this case and the analysis of Section 201(c) by this Court a few months later in *Tasini*, that "conflict" consists at most of a difference in approach driven by differences between the two works at issue in this case and in *Tasini*. In this case, the Eleventh Circuit held that "common-sense copyright analysis" compelled the conclusion that the combination of the Replica, the Sequence and the Program "created a new product...in a new medium, for a new market that far transcends any privilege or other mere reproduction envisioned in 201(c)." 244 F.3d at 1273. While the CNG contained intact issues of National Geographic, the CNG itself included the additional elements of the Sequence and the Program. Given the nature of the CNG, the Eleventh Circuit's analysis did not end (as Petitioners appear to argue it should have) merely because intact periodicals were one part of the CNG. The court still had to decide whether the CNG as a whole constituted a mere revision of the original editions of National Geographic (the Replica). In answering that question, the lower court's characterization of the CNG as a new work was simply its way of explaining why the CNG was more than just the "revision" authorized by the Section 201(c) privilege.

By contrast, the databases at issue in *Tasini* did not contain intact issues of the New York Times. 121 S.Ct. at 2385-86.[2] So there was no occasion for this Court to decide whether the databases should be considered "new" works because of their inclusion of intact issues of that newspaper.

Accordingly, the alleged conflict between the two decisions is at most ephemeral. More important, there is no basis for concluding that applying what Petitioners view as the *Tasini* test would have led the Eleventh Circuit to arrive at

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[2] The Court observed, however, that even if the databases contained intact copies of the New York Times, the databases still could not be characterized as "revisions" of any one periodical edition. *Id.*

a different conclusion. In fact, the two decisions are consistent with each other in their interpretation of the statute in light of its purposes and legislative history. Accepting this case for review and then summarily vacating and remanding the Eleventh Circuit's decision, which Petitioners urge would be appropriate, would therefore be futile and wasteful of judicial resources.

Furthermore, the circumstances of this case do not justify issuance of a "GVR" order (grant certiorari, vacate the judgment below, and remand the case) under the standards articulated by recent decisions of this Court. In *Lawrence v. Chater*, 516 U.S. 163 (1996), and *Stutson v. United States*, 516 U.S. 193 (1996), the Court observed in both the civil and criminal context that its GVR power should be exercised "sparingly." The Court acknowledged that "a wide range of intervening developments . . . may justify a GVR order." *Chater*, 516 U.S. at 173. The Court nonetheless made clear that a GVR order is appropriate only where "we have reason to believe that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation . . . ." *Id.* at 167. In applying this standard, the Court required a "reasonable probability" that the intervening development would make a difference in the outcome.[3]

This is manifestly not such a case. No reasonable reading of the Eleventh Circuit's decision would lead to the conclusion that the lower court would have found the CNG to

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[3] *Chater* was an example of such a case. There the federal government changed its interpretation of the federal benefits law at issue after the court of appeals decision. The Solicitor General accordingly not only urged the Court to grant certiorari, but also to issue a GVR order. The Court acceded to that request in light of its conclusion that there was a "reasonable probability" that the court of appeals would consider the new agency interpretation to be "outcome determinative." *Id.* at 174.

be a "revision" under this Court's teaching in *Tasini*. This is especially true given that the Eleventh Circuit's decision in this case was issued after the Second Circuit decision in *Tasini*, which was subsequently affirmed by this Court.

Even more fundamentally, the Eleventh Circuit was utterly convinced that the Section 201(c) phrase "that particular collective work" could not be "stretch[ed]" to encompass the Sequence and Program elements of the CNG. 244 F.3d at 1272. There is simply no "reasonable probability" that the Eleventh Circuit, reconsidering this case in light of this Court's decision in *Tasini*, would depart from its conclusion that the CNG "is in no sense a 'revision.'" *Id.*

Finally, the Petitioners' dire predictions about the impact of the Eleventh Circuit's decision on historical archives and access to periodicals by the public have all been heard before in the context of *Tasini*—and were rejected by the Court as reasons to restrict the rights of authors under Section 201(c). 121 S.Ct. at 2393-94. Like this Court in *Tasini*, the Eleventh Circuit made specific mention of the alternatives (such as mandatory license fees) to injunctive relief that should be considered in the first instance by the district court. The appropriate forum for considering the publishers' concerns about the impact of the two decisions on their products is the trial court, not this Court. The Petitioners in this case should, like the publishers in *Tasini*, present those concerns to the district court as it considers the appropriate relief to be awarded. If the Petitioners here (and the publishers in *Tasini*) are dissatisifed with the scope and form of relief granted by the district courts, they can avail themselves of appellate review without the need for further intervention by this Court.

Respectfully submitted,

VICTOR S. PERLMAN *
AMERICAN SOCIETY OF MEDIA
PHOTOGRAPHERS
150 North Second Street
Philadelphia, PA 19106-1912
(215) 451-0884

* Counsel of Record

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